

Attachment 1 - Narrative on NMFS Decision-Making Regarding Permit No. 1004-1566-00

Given the large amount of information submitted for consideration in permit application no. 1004-1566 (559 public comments) and certain aspects of the status of the Argentine killer whale, the National Marine Fisheries Service (NMFS) felt it would be appropriate to provide an in-depth explanation of how NMFS made a final determination on this matter. This document provides background to educate those interested in the aspects of the U.S. Marine Mammal Protection Act (*16 U.S.C. 1361 et seq.*) under consideration in this matter, and how all the information submitted by the applicant and the public fit into the MMPA requirements. This document, in particular, focuses on the aspects regarding the original collection of the adult male killer whale from Argentina. Please refer to the NMFS decision memo and attachments for more detail on the specific information considered, comments received and NMFS' response.

The MMPA (16 U.S.C. 1374; Section 104 (c)) and the corresponding NMFS regulations (50 CFR 216) provide that NMFS may issue a permit for the importation and holding of marine mammals in captivity for public display purposes as long as NMFS determines that the applicant: (1) offers a program for education or conservation purposes that is based on professionally recognized standards of the public display community; (2) is registered or holds a license issued under 7 U.S.C. 2131 et seq.; and (3) maintains facilities for the public display of marine mammals that are open to the public on a regularly scheduled basis and that access to such facilities is not limited or restricted other than by charging of an admission fee. The applicant meets these requirements.

In addition, NMFS considered if the methods of the action itself are consistent with the MMPA (e.g., methods of capture, supervision, care and transportation). These criteria are covered under Section 104(c)(1) of the MMPA. As the activity of importation does not involve capture, NMFS could only look at issues of supervision, care and transportation in respect to importation. Where applicable, NMFS consulted with the Animal and Plant Health Inspection Service (APHIS) regarding issues under the mandates of the Animal Welfare Act (AWA) (e.g., adequacy of receiving facility, animal care standards once at facility, health of whales, etc.). APHIS addressed each relevant issue and found that the activities were consistent with the purposes and policies of the AWA.

NMFS also considered information regarding the original collection of the two whales. Section 102(c)(1) of the MMPA states that it is unlawful to import into the United States any marine mammal that: (1) was taken in violation of the MMPA or (2) was taken in another country in violation of that country's laws. NMFS consulted with the Argentinean government regarding the legality of captive marine mammals, and the Argentinean government supplied a statement that no laws existed regarding collection in 1992 (when the male was collected) and he has been maintained legally by Mundo Marino since that time. The female whale was born in captivity in France, an activity allowed for under French law. Therefore, NMFS determined to the extent of its ability, that the animals were not collected in violation of existing laws of their respective countries of origin.

NMFS also considered Section 102(b) of the MMPA which provides that it is unlawful to import into the United States any marine mammal that was: (1) pregnant at the time of taking; (2) nursing at the time of taking, or less than eight months old, whichever occurs later; (3) taken from a species or population stock which the Secretary has, by regulation published in the Federal Register, designated as a depleted species or stock; or (4) taken in a manner deemed inhumane by the Secretary. Based on the documents provided, neither animal was pregnant or nursing at the time of taking or comes from a stock designated as depleted under the MMPA. The adult female from Marineland S.A., Antibes, France was captive born and there are no issues of humaneness regarding the collection of this animal. The adult male from Mundo Marino, Buenos Aires, Argentina was collected from the wild during a stranding event and therefore, issues of humaneness regarding his original collection were considered.

NMFS carefully addressed the issue of whether the original collection of the male killer whale in Argentina was considered inhumane. Every document and comment received was reviewed by NMFS staff and where needed, additional information was sought. Based on all of this information, NMFS could not conclude based on substantial evidence in the record that the original collection of the male whale occurred as a 'forced stranding' which, in turn, could be considered inhumane. However, the information provided that contradicted Mundo Marino's account was not substantial enough for NMFS to determine that the original collection was inhumane. Therefore, NMFS could not determine that the importation would be unlawful under MMPA Section 102(b).

It is important to note that NMFS has the burden to demonstrate that a marine mammal was taken in an inhumane manner and thus import of that marine mammal would be unlawful under Section 102(b)(4). Based on the entire record, NMFS could not find substantial evidence that the marine mammal was taken in an inhumane manner. This is different from the issuance criteria for the import permit under Section 104 and NMFS' implementing regulations, including that the proposed activity (in this case, import) is conducted in a humane manner. The applicant has the burden to demonstrate the proposed activity (in this case, import) meets these issuance criteria.

This decision is consistent with recommendations from the U.S. Marine Mammal Commission and the Argentinean government (who previously stated that they were unable to investigate the original collection of the adult male due to a lack of credible evidence). At the time of the male's collection, no Argentinean law existed prohibiting the capture of marine mammals by forced stranding. Apparently, as a consequence, the Argentinean government was not in a position to investigate the circumstances of the collection, and therefore no information was available to either support or deny Mundo Marino's statement that the whale naturally stranded. Today, an Argentinean law (Public Law No. 25052) prohibits collection of wild orcas either with nets or through forced strandings.

NMFS believes this decision is consistent with the mandates of the MMPA as they currently stand. However, NMFS is concerned about the potential that people may take marine mammals by forced strandings and then attempt to import those marine mammals into the United States. In

order to ensure that this does not occur, NMFS intends to review applications for import with scrutiny. As each permit application to import marine mammals is approved on a case-by-case basis, this particular permit decision should in no way suggest that future imports will be authorized if there is substantial evidence of forced strandings when the animal was taken.

Text of the MMPA can be viewed on the NMFS website or a hard copy can be requested by contacting the NMFS Office of Protected Resources, Permits, Conservation and Education Division. The contact information is as follows:

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www.nmfs.noaa.gov/prot_res/laws/MMPA/MMPA.html